IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WARREN REYNOLDS, JOHN REYNOLDS, through his guardians, Jacklen E. Powell and Wilmington Trust Co., and WILMINGTON TRUST CO., as Trustee,	:	
Plaintiffs	:	
	:	**CIVIL ACTION**
v.	:	**NO. 01-3773**
RICK'S MUSHROOM SERVICE, INC., M.A.Y. FARMS, INC., and RICHARD MASHA,	:	
Defendants	:	

MEMORANDUM OPINION AND ORDER

RUFE, J. **November 17, 2003**

Presently before the Court is Plaintiffs' Motion to Strike or Dismiss Defendants' Third Party Complaint. For the reasons set out below, Plaintiffs' Motion is granted.

I. BACKGROUND

The following is a summary of the bare adjudicative facts and is presented for purposes of this motion only. A full recitation of the facts of this case may be found in the Court's prior opinion. See Reynolds v. Rick's Mushroom Service, Inc., 246 F. Supp. 2d 449 (E.D. Pa. 2003). This environmental litigation involves a dispute between neighboring landowners. Defendants own and operate a facility that processes and stores waste generated by the mushroom farming industry. Plaintiffs contend that Defendants' facility produces polluted runoff that enters a nearby stream, Trout Run, and eventually flows into a pond located on Plaintiffs' property. Plaintiffs allege that Defendants' operation violates various federal and state environmental statutes, as well as state common law.

Plaintiffs filed their first Complaint on July 26, 2001, and Defendants filed their Answer on September 27, 2001. On June 24, 2002, after the close of discovery, Plaintiffs moved for summary judgment. Defendants failed to file any timely response.[1] On September 25, 2002, Plaintiffs filed a Motion for Leave to Amend the Complaint, seeking to add one count under § 402 of the Pennsylvania Clean Streams Law, 35 P.S. § 691.402, and one count under § 7002 of the Solid Waste Disposal Act, 42 U.S.C. § 6972. Defendants filed an opposition to this Motion.

On February 24, 2003, the Court granted in part and denied in part Plaintiffs' Motion for Summary Judgment, finding Defendants liable under § 301 of the Clean Water Act, 33 U.S.C. § 1311(a), and § 401 of the Pennsylvania Clean Streams Law, 35 P.S. § 691.401. Thereafter, Defendants obtained new counsel, and the Court held a status conference on March 10, 2003. With the Court's permission, Defendants filed an additional response to Plaintiffs' Motion for Leave to Amend the Complaint, in which Defendants withdrew their opposition and requested additional discovery related to the "new allegations" in the Amended Complaint. Accordingly, the Court granted Plaintiffs' Motion as uncontested.

Plaintiffs filed an Amended Complaint on April 10, 2003. Defendants filed an Answer to the Amended Complaint on April 23, 2003 and filed an Amended Answer on May 5, 2003. On May 7, 2003, without leave of Court, Defendants filed a Third Party Complaint naming nineteen individuals and businesses as third party defendants. Defendants contend that these persons and entities may also be responsible for polluting Plaintiffs' pond and seek to join them for purposes of contribution and indemnification.

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[1] The case was reassigned to this judge's docket on July 10, 2002 pursuant to the Eastern District of Pennsylvania's procedure for random reassignment of cases.

On May 21, 2003, Plaintiffs filed the instant Motion to Strike or Dismiss[2] Defendants' Third Party Complaint. By stipulation and order, the parties have agreed that Defendants will not serve the Third Party Complaint until after the Court rules on Plaintiffs' Motion to Strike or Dismiss.

II. DISCUSSION

Federal Rule of Civil Procedure 14 governs when a defendant seeks to join a third party defendant. The Rule provides, in relevant part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action.

Fed. R. Civ. P. 14(a). Rule 14 is construed liberally in the interest of judicial economy. Scott v. Walter Kidde Portable Equip., Inc., No. 02-1460, 2002 WL 1880521, at *1 (E.D. Pa. Aug. 12, 2002). Eastern District of Pennsylvania Local Rule of Civil Procedure 14.1(a) also governs this issue. It provides, in relevant part:

> Applications pursuant to Fed. R. Civ. P. 14 for leave to join additional parties after the expiration of the time limits specified in that rule will ordinarily be denied as untimely unless filed not more than ninety (90) days after service of the moving party's answer. If it is made to appear to the satisfaction of the court, that the identity of the party sought to be joined, or the basis for joinder, could not with reasonable diligence have been ascertained within said time period, a brief further extension of time may be granted by the Court in the interests of justice.

E. Dist. of Pa. Local R. Civ. P. 14.1(a).

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[2] Plaintiffs set forth no arguments in support of dismissing the Third Party Complaint. Accordingly, this portion of the Motion is denied.

Plaintiffs move to strike Defendants' Third Party Complaint as untimely. If the Court determines that Defendants' filing of the Third Party Complaint was untimely, Defendants bear the burden of demonstrating circumstances sufficient to justify the delay. See Zielinkski v. Zappalla, 470 F. Supp. 351, 353 (E.D. Pa. 1979). Whether to permit joinder under Rule 14(a) rests within the sound discretion of the district court. Maine v. United States Dep't of Labor, 669 F.2d 827, 831 (1st Cir. 1982); Scott, 2002 WL 1880521, at *1.

The filing of the Third Party Complaint was timely if it was filed "not later than 10 days after serving the original answer." Fed. R. Civ. P. 14(a). Defendants argue that the Court should consider the Amended Complaint to be the original complaint and by extension look to their Answer to the Amended Complaint as the "original answer." Therefore, they argue, because Defendants filed their Third Party Complaint within ten days after filing their Answer to the Amended Complaint,[3] it is timely. If the Third Party Complaint was timely filed, Defendants need not seek leave of Court. See id.

The Court is not persuaded that Defendants' Answer to the Amended Complaint should be considered the "original answer" as that term is used in Rule 14(a). Defendants proceed on two theories. First, they contend that the Amended Complaint is a "stand-alone pleading that entirely supplants the prior complaint" and thus should be viewed as the original complaint, thereby making the answer thereto the "original answer." Defendants' Opp. at 10. It appears that only one federal district court has adopted this approach. See Nelson v. Quimby Island Reclamation Dist. Facilities Corp., 491 F. Supp. 1364, 1386-87 (N.D. Cal. 1980). No court in this circuit has adopted such a

[3] Defendants filed an Answer to the Amended Complaint on April 23, 2003, and the Third Party Complaint on May 7, 2003. Excluding Saturdays and Sundays from the computation, see Fed. R. Civ. P. 6(a), Defendants filed the Third Party Complaint on the tenth day after filing their Answer to the Amended Complaint.

strict interpretation, and Defendants offer no good reason for this Court to do so. Moreover, there are at least two good reasons to reject Nelson. First, Nelson is clearly distinguishable from the instant matter. There, the proposed third-party defendants sought to dismiss the third-party complaint, but unlike this case no party to the action objected to joinder. See 491 F. Supp. at 1387 n.48. In denying the motion to dismiss the third-party complaint, the Nelson court correctly recognized that Rule 14 protects the parties to the action, not the proposed third-party defendants. See id.

Second, the Court respectfully disagrees with the Nelson court's reasoning. In support of its conclusion that the answer to the last-filed amended complaint is the "original answer" for purposes of Rule 14, the Nelson court cited "logic" and the "policy objective of Rule 14(a), which is to give the defendant an incentive to implead the third party seasonably." Id. at 1387 (citing 3 Moore's Federal Practice ¶ 14.05(2), at 14-197 (2d ed. 1979)). The Nelson court's interpretation is contrary to the plain text of Rule 14(a), so this Court doubts whether such an interpretation comports with "logic." In addition, if the policy objective of Rule 14 is "to give the defendant an incentive to implead the third party seasonably," the Court is at a loss to discern how a per se rule serves that purpose if it essentially permits joinder *every time* a plaintiff files an amended complaint. Id. For example, if the new substantive allegations of the amended complaint did not change the need for impleader, any subsequent joinder would not be "seasonable" at all. Rather, joinder would be "seasonable" when the third-party defendants' liability first becomes apparent. Cf. In re Agent Orange Prod. Liab. Litig., 100 F.R.D. 778, 780 (E.D.N.Y. 1984) ("The filing of an amended complaint that does not change the need for impleader does not afford an opportunity to implead without leave of the court. . . . While the plaintiff's latest complaint makes no reference to its

previous complaints, it does adopt substantially the allegations of the first complaint. Uniroyal was, therefore, on notice from the time of the filing of the first complaint of all facts relevant to the impleader claim."). On the other hand, the Nelson court's rule provides a disincentive for filing amended complaints, especially where, as here, the plaintiff does not wish to expand the litigation beyond his chosen defendant. As explained below, in this Court's view, determining whether an answer to an amended complaint should be viewed as the "original answer" requires some inspection of the amended complaint.

Second, Defendants ask the Court to find that the Third Party Complaint was filed as of right because it was filed "within ten days of answering an amended complaint alleging new facts on which the third party complaint is based." Defendants' Opp. at 11. As one court put it, "the 'original answer' can be an answer to an amended complaint, so long as the basis for impleader is that which is new, i.e., 'original,' in the answer to the amended complaint." Fed. Trade Comm'n v. Capital City Mortgage Corp., 186 F.R.D. 245, 247 (D.D.C. 1999) (adopting this "nuanced, functional reading"). When Plaintiffs amended the Complaint, they added two counts and made no other meaningful changes to the Complaint[4] save adding the three sentences to paragraph 15 that appear italicized below:

> Wastewater from the storage area at the Waste Facility flows into a sedimentation basin and then into an on-site impoundment with a total storage capacity of approximately 1,820,000 gallons. The wastewater is periodically pumped though a series of pipes to a spray irrigation system consisting of approximately twelve spray guns that disperse the wastewater onto two fields located adjacent to the impoundment. These spray fields total approximately 2-3 acres and drain into channels and ditches that discharge onto neighboring properties and into Trout Run and its tributaries. *Some wastewater generated*

[4] Plaintiffs also added some procedural events that occurred in the many intervening months. See, e.g., ¶ 26 (noting that Plaintiffs sent "intent to sue" letters to government agencies).

> *from the storage area also bypasses the impoundment and runs directly into Trout Run. Wastewater is also pumped through hoses onto an area adjacent to several occupied residences. This disposal area is near a drinking supply well that serves several of these residences.*

Amended Complaint ¶ 15. Defendants seize upon the first new sentence and argue that this "new factual allegation" - - that contaminated storm water "runs directly into Trout Run" - - is also the basis for the Third Party Complaint. Therefore, so the argument goes, because the basis for impleader is that which is new in the Amended Complaint, the Third Party Complaint was timely filed.[5]

Defendants' argument proceeds from an erroneous premise. It is not significant that Plaintiffs' Amended Complaint includes some new *factual* allegation. What is significant is whether the Amended Complaint created "new theories of liability." Oberholtzer v. Scranton, 59 F.R.D. 572, 575 (E.D. Pa. 1973) (calculating time for filing third-party action from time of original complaint because subsequent complaints "merely amplified the original"). In the original paragraph fifteen, Plaintiffs alleged a failure in Defendants' existing waste water control systems - - a failure that resulted in "discharges onto neighboring properties and into Trout Run and its tributaries." The amendment to paragraph fifteen includes the additional allegation that some wastewater "bypasses" these controls and "runs directly into Trout Run." Yet, the gravamen of Plaintiffs' claims and the theory on which they rely remain unchanged: waste water from Defendants' property is polluting a stream in violation of statutory and common law. At best, these additional factual allegations

[5] Defendants do not contend that the Third Party Complaint relates to the two counts added to the Amended Complaint, which deal with solid waste.

provide added detail, but they certainly do not advance any new legal theory.[6] Defendants have failed to demonstrate how Plaintiffs' new factual allegations have any legal import vis a vis Plaintiffs' legal claims against Defendants.

Accordingly, the Court will use the filing date of the original complaint for purposes of Rule 14(a) and Local Rule 14.1(a). Because Defendants filed the Third Party Complaint more than ten (10) days after filing the "original answer," the Third Party Complaint was not filed in a timely manner. Fed. R. Civ. P. 14(a). Moreover, because the Third Party Complaint was filed more than ninety (90) days after service of the original answer, Defendants bear the burden of demonstrating that the delay was justified, for ordinarily leave is not granted after such a lengthy delay. Zielinkski, 470 F. Supp. at 353; E. Dist. of Pa. Local R. 14.1(a) ("Applications . . . for leave to join additional parties after the expiration of the time limits specified in [Rule 14] will ordinarily be denied as untimely unless filed not more than ninety (90) days after service of the moving party's answer.").

In determining whether to permit the untimely filing of a Third Party Complaint, the court should generally consider: (1) the possible prejudice to Plaintiffs; (2) the potential for complication of issues at trial; (3) the probability of trial delay; and (4) the timeliness of the attempt to join third parties. Con-Tech Sales Defined Benefit Trust v. Cockerham, 715 F. Supp. 701, 704 (E.D. Pa. 1989). As explained below, these factors do not weigh in favor of permitting joinder at this late stage in the litigation.

First, adding nineteen new parties to this action would significantly prejudice Plaintiffs by

[6] Defendants complain that Plaintiffs added this sentence "to benefit from the new legal theories alleged in [the newly added counts] while, at the same time, seeking to prevent the Defendants having the right to defend against the new facts alleged." Defendants' Opp. at 11. To the contrary, Defendants will have every opportunity to contest Plaintiffs' factual averments at trial.

increasing the inconvenience and costs of litigation.[7] See Indus. Valley Bank & Trust Co. v. First Commercial Corp., No. 86-1265, 1986 U.S. Dist. LEXIS 22526, at *17 (E.D. Pa. July 22, 1986) (denying defendants' motion for joinder because, inter alia, "there will be additional expense and inconvenience to the parties if joinder is permitted"). This case has proceeded through discovery and through one round of dispositive motions. While the Court has permitted some additional discovery since granting Plaintiffs' motion for summary judgment, such discovery has been limited to issues presented by the new counts in the Amended Complaint and Plaintiffs' separately-filed Motion for Injunctive Relief. Adding nineteen additional third-party defendants would require Plaintiffs to participate in yet another round of general discovery and bear its attendant costs and burdens.

Second, the addition of nineteen additional parties would certainly complicate the issues at trial. The Third Party Complaint would inject into this case complex factual and legal questions concerning who or what (besides Defendants) may have contributed to pollution in the stream or in Plaintiffs' pond. As both parties agree, trial of these issues would involve numerous experts and factual evidence not relevant to Plaintiffs' claims against Defendants. Were this case to go to trial with so many defendants seeking to avoid and/or shift liability, there undoubtedly would arise a battle of the experts. Such battles are complicated enough when there are only two experts presenting two competing theories, and the Court is particularly concerned that a battle among multiple experts all pointing the finger at other parties is likely to confuse the fact finder. This is a

[7] Defendants make light of any purported financial burden to Plaintiffs, claiming Plaintiffs possess "enormous family wealth." Defendants' Opp. at 16 n.17. This kind of irrelevant information is peppered throughout Defendants' pleadings and suggests that Defendants intend to reinvent this litigation as class warfare - - pitting wealthy, sinister "gentlemen farmers" against the impoverished, beleaguered Everyman. Defendants also attempt to impugn Plaintiffs' motives in pursuing this lawsuit, painting themselves as an innocent Desdemona opposite Plaintiffs' scheming Iago. See William Shakespeare, Othello. While Defendants are certainly entitled to attempt this approach with a jury, such characterizations hold no sway with the Court. In fact, these attacks annoy more than they persuade.

distinct possibility in this kind of case.

Third, trial of this matter would be substantially delayed by permitting joinder. Although presently there is no trial date set, the Court is in the midst of hearing evidence on Plaintiffs' Motion for Injunctive Relief. Regardless of the outcome of that proceeding, general discovery is closed, and this matter will be ready for trial in a matter of weeks or a few months. By contrast, if Defendants are permitted to join nineteen third-party defendants, trial would have to be delayed for many months if not years. Considering that this case was filed well over two years ago, and that a partial ruling on liability has already been determined, further delay is not in the interest of justice.[8]

Finally, Defendants' attempt to join additional parties was not timely. The original Complaint was filed on July 26, 2001, and the original answer was filed on September 27, 2001. It was not until over eighteen months later that Defendants sought to join additional parties. Defendants claim that this lateness was justified because their first attorney was incompetent and committed malpractice. While the Court expresses no opinion on the conduct of Defendants' prior counsel, it notes that other courts have found that inattentiveness or mistake is not a sufficient justification for delay. See, e.g., Tate v. Rowen, Civ. No. 88-2822, 1989 U.S. Dist. LEXIS 107, at *4 (E.D. Pa. Jan. 5, 1989) (Pollak, J.) ("Although the court may exercise its discretion to allow joinder where justice requires it, inadvertence or carelessness of the movant is not a sufficient reason."). There is no question that Defendants could have joined these nineteen defendants at the time this suit was initiated, for Defendants contend that each proposed third-party defendant contributed to pollution in the stream for the past thirty years. The Court is not willing to

[8] Of course, if Defendants are ultimately ordered to pay damages to Plaintiffs, Defendants may then seek relief against the proposed third-party defendants in a separate, subsequent action.

significantly expand this litigation due to alleged oversight by Defendants' former attorney.

Although one of Rule 14's purposes is to avoid "circuity of action" and to settle related matters in one suit, see Scott, 2002 WL 1880521, at *1, the Court concludes that the circumstances outlined above outweigh these concerns. Accordingly, the Court will not permit joinder of the proposed third-party defendants. Plaintiffs' motion to strike is granted. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WARREN REYNOLDS, JOHN REYNOLDS, through his guardians, Jacklen E. Powell and Wilmington Trust Co., and WILMINGTON TRUST CO., as Trustee,	:	
Plaintiffs	:	
	:	**CIVIL ACTION**
v.	:	**NO. 01-3773**
RICK'S MUSHROOM SERVICE, INC., M.A.Y. FARMS, INC., and RICHARD MASHA,	:	
Defendants	:	

ORDER

AND NOW, this 17th day of November, 2003, upon consideration of Plaintiffs' Motion to Strike or Dismiss Defendants' Third Party Complaint [Docs. # 63-64], Defendants' Opposition thereto [Doc. # 71], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Plaintiffs' Motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Plaintiffs' Motion to Strike is **GRANTED**.

2. The Court hereby **STRIKES** Defendants' Third Party Complaint in the Nature of Contribution and Indemnity for Injunctive Relief and Damages [Doc. # 57]. The Clerk of Court shall mark this pleading as **STRICKEN** from the case docket.

3. Plaintiffs' Motion to Dismiss is **DENIED**.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFE, J.